

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**FLEETA HILL, *Applicant***

**vs.**

**COSTCO WHOLE FOOD CORP, PSI,  
ADMINISTRATED BY  
HELMSMAN MANAGEMENT, *Defendants***

**Adjudication Number: ADJ16527694  
Oakland District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION**

Applicant seeks reconsideration of the February 2, 2024 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained industrial injury to her cervical spine, head, and in the form of headaches, and claims to have sustained industrial injury to her left shoulder and to her eyes in the form of a vision disturbance while employed as a maintenance assistant on June 4, 2022. The WCJ further found that defendant made a legally valid offer of modified/alternative work, effective April 18, 2023, which the Applicant declined to accept and that defendant has no liability for temporary disability indemnity on or after that date.

Applicant contends that the WCJ erred by not considering whether the offer of modified or alternative work was medically appropriate given the length of the commute it would necessitate.

We did not receive an answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

In the Report, the WCJ stated:

This case proceeded to trial at an Expedited Hearing on October 31, 2023, on the issues of Applicant's claim of TTD from March 24, 2023 to the present and continuing. (Minutes of Hearing and Summary of Evidence (MOH/SOE) dated 10/31/23 at p. 3.) The Applicant was the only witness to testify. (*Id.* at pp. 4-6.) At the conclusion of the hearing, at defense counsel's request, submission was

delayed for one week, to November 7 at 5:00 PM, to allow additional time for either party to file a Post-Trial Brief. (MOH/SOE at pp. 1, 7.) As noted on page 7 of the MOH/SOE, any filings thereafter would not be considered. (*Id.*) Although not in the record, on November 9, 2023 at 11:03 AM, which was two days after the deadline, Applicant's attorney emailed the court requesting an extension of time to November 13, 2023, file his post-trial brief. Defense counsel objected and based on that objection, as well as the warning to the parties at trial when the one-week additional time for briefing was given, which neither attorney objected to and/or asked for more time, I denied the request.

Applicant sustained an accepted injury on June 4, 2022, to her cervical spine, head, and in the form of headaches while employed by Costco as a maintenance assistant. (MOH/SOE, Stipulation No. 1 at p. 2.) She also claims injuries to her left shoulder and in the form of vision disturbance. (*Id.*) TTD was paid from June 6, 2022 through July 22, 2022 at the rate of \$436.43 per week, temporary partial disability (TPD) was paid from July 23, 2022 through November 18, 2022 at the rate of \$218.10, and TTD was paid again from November 19, 2022 through March 23, 2023. (MOH/SOE, Stipulation No. 3 at p. 2.) Those payments are not in dispute, and the parties stipulated that as of trial, the Applicant was not yet permanent and stationary per the opinion of both the QME, Leroy Banks, M.D., in his report dated March 3, 2023, and the PTP, Matthew Johnson, D.O., that she has not returned to work, and that the applicable temporary work restrictions are those provided by the QME. (MOH/SOE, Stipulations No. 6 and No. 7, at p. 2.)

On April 6, 2023, Priscilla Goico of Helmsman vocational rehabilitation [sic] mailed a letter of the same date to the Applicant at her Manteca address with a Costco ICEP Job Offer dated April 6, 2023, and related materials. (Joint 102.) That offer was through the Costco Interim Community Employment Program (ICEP) and is at a community volunteer agency, which was specifically compatible with the current job restrictions of her PTP, Dr. Matthew Johnson, which were: no work at heights, on uneven or wet surfaces, no lifting or more than 10 pounds, no repetitive bending at the neck, no repetitive squatting/kneeling, and no work for more than 4 hours a day. (*Id.* at p. 1 of Costco letter dated 4/6/23 from Jasmine DeGuzman.) The agency for this placement was Zooniverse and was located at 198 Plaza Drive in Vallejo, which turned out to be the store location. (*Id.*, Joint 102 at p. 1. of the ICEP Agency Information Enclosure.)

Applicant testified at trial in relevant part as follows. She was injured at the Vallejo Costco, and at time was living in Vallejo, approximately 4 minutes from the store. (MOH/SOE at p. 4.) Immediately after the injury she received TTD, but later returned to work on modified duty four hours a day. (*Id.*) She exhausted the available modified duty, and thereafter she received TTD again until it ended on March 23, 2023. (*Id.*) She subsequently moved to Manteca for financial reasons and moved in with her daughter to reduce her expenses in an effort to

mitigate the decline in her income associated with TTD/TPD she was receiving. (*Id.*) Under the circumstances, she could no longer afford her Vallejo apartment. Before moving, she discussed the possibility of transferring to another Costco store with Terrell, the general manager of the Vallejo Costco, on 3 or 4 occasions. He advised she could download an employment application for a new store and talk with HR to get the necessary forms, and if she asked, he said would talk with managers of the new location to try to facilitate such a transfer, but that never happened. (*Id.*)

She never received an offer of modified or alternative work between November of 2022 and March 23, 2023, when TTD ended. (*Id.*) Her first notice of an offer of modified work was a letter dated April 6, 2023 from Priscilla Goico. (*Id.* at p. 5.) (Joint 102.) When her TTD ended, she called the Helmsman adjuster to ask why, and was advised she had failed to respond to an earlier offer of modified/alternative work sen[t] to her in March, but she never received any such letter or offer. (*Id.*) She was told it had been sent to her Vallejo address, but she was no longer there, having moved before December 1, 2022. (*Id.*) She told her supervisor at the Vallejo Costco in approximately December 2022, that she was moving to Manteca. (*Id.*) She received TTD and TPD payments through direct deposit and not via checks through the mail. (*Id.*) She later spoke with Priscilla Goico, who offered modified/alternative work and sent her the letter dated April 6, 2023, which she received. She told Priscilla of her move to Manteca, and when she received the letter dated April 6, 2023, she called her back to advise she could do it, but told her it was not a reasonable commuting distance because of the estimated commute of 2 hours each way, and was not practical because the offer was only for four hours of work a day. (*Id.*) Priscilla said she would talk with those involved to see if they could offer the modified/alternative work at a site closer to Manteca and call her back, but she never did. (*Id.*)

There has been no communication from Helmsman or Costco management since regarding modified or alternative work, although she has spoken with her prior supervisor at the Vallejo Costco, who calls her every 2 months or so to see how she is doing. (*Id.* at pp. 5-6.) She was willing and able to do the offered modified/alternative work, but the distance to the job was a problem. (*Id.* at p. 5.) She completed and returned the reply form of the mod/alt work offer, stating she could and would accept the job if it were closer to her home, and accepted the job with that qualifier, writing this in, and returning via U.S. Mail to Priscilla Goico. (*Id.* at p. 6.) She did not refuse an offer of modified duty or work. (*Id.*) On cross-examination, she acknowledges the location of the mod/alt work offer was at 198 Plaza Drive in Vallejo. (*Id.*, Joint 102 at p. 1. of the ICEP Agency Information Enclosure.) She moved in with daughter in Manteca for financial reasons, and currently lives there. (*Id.*) She does not have an obligation to pay rent and can pay what she wants. (*Id.*)

The offer of modified/alternative work from Costco dated April 6, 2023, and the related cover letter from Priscilla Goico reflect an offer of modified/alternative work at Zooniverse located at 198 Plaza Drive, in Vallejo, which reportedly will be consistent with the current specified work restrictions of her PTP, Dr. Matthew Johnson. (*Id.* at p. 1 of the Costco letter dated 4/6/23.) Per the attached ICEP Agency Information enclosure reflecting the location and duties at the agency Zooniverse, which include research and transcribing photos of cemeteries to make them searchable online, she was to report to what appears to be the Vallejo Costco at its address of 198 Plaza Drive, in Vallejo, and log into a computer there for her online work at Zooniverse. (*Id.*) She was to report on Friday April 7, 2023 at 2:00 PM and there are instructions for her to watch training videos. (*Id.*)

(Report at pp. 2-6, footnotes omitted.)

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 *et seq.*

## I.

We highlight the following legal principles that may be relevant to our review of this matter:

Temporary disability indemnity is a workers' compensation benefit that is paid while an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. Industrial Acc. Com. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

In *Huston, supra*, the Court of Appeal stated:

In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [Citation.] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [Citation.] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [Citation.] If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability. [Citation.] If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments.

(*Huston, supra*, at p. 860.)

The holding in *Huston* links an employer's showing that modified work is available and offered with an injured worker's entitlement to temporary disability. Thus, in order to be relieved of potential liability for temporary disability for an injured worker capable of returning to modified duties, the employer must establish that work within applicant's restrictions is both available and offered. In *Dennis v. State of California* 85 Cal. Comp. Cases 389, 405 (Appeals Board en banc), we stated that:

A bona fide offer is ... an offer made in good faith or a sincere offer. (See also *Leach v. Home Savings & Loan Assn.* (1986) 185 Cal. App. 3d 1295, 1301–1302 [230 Cal. Rptr. 553], quoting Black's Law Dict. (4th ed. 1968), p. 223, col. 2 [defining a "bona fide transaction" as a "transaction which the parties operate '[in] or with good faith; honestly, openly, and sincerely; without deceit or fraud'"]; *Merrill v. Dept. of Motor Vehicles* (1969) 71 Cal. 2d 907, 920–921 [80 Cal. Rptr. 89, 458 P.2d 33] [analyzing legal uses of the term and defining a "bona fide car dealer" as one acting with honesty, fair dealing and freedom from deceit].)

(*Dennis v. State of California, supra*, 85 Cal.Comp.Cases at p. 405, fn 19.)

Labor Code section 4658.1 states in relevant part that:

(b) "Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.

(c) "Alternative work" means work that the employee has the ability to perform, that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and that is located within reasonable commuting distance of the employee's residence at the time of injury.

(Lab. Code, § 4658.1(b), (c).)

Moreover, an injured worker who refuses modified work without giving a good reason may be estopped from claiming temporary total disability. (*Vittone v. Workers' Camp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 435 (writ den.).)

Here, it is unclear from our preliminary review of the evidence and the existing record as to whether the offer of modified work made by defendant was a bona fide offer. Taking into account the statutory time constraints for acting on the petitions, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case.

## II.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) “[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied.”; see generally Lab. Code, § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.”].)

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d

1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].)

Labor Code section 5901 states in relevant part that:

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. ...

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

### III.

Accordingly, we grant applicant’s Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.



For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration is **GRANTED**.

**IT IS FURTHER ORDERED** that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

I CONCUR,

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 29, 2024**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**FLEETA HILL  
ROBERT E. WOOD, ESQ.  
MICHAEL SULLIVAN & ASSOCIATES LLP**

**PAG/mc**

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *MC*